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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

70-193

No. 1735

LEONARD RUSSO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1970

No.

LEONARD RUSSO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Leonard Russo, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (rendered April 8, 1971) affirming the judgment rendered against him in the United States District Court for the Southern District of New York on June 5, 1970. A motion for rehearing to the United States Court of Appeals for the Second Circuit was denied on April 23, 1971.

A.

The Opinion Below

On April 8, 1971, the Petitioner's appeal to the United States Court of Appeals for the Second Circuit was affirmed and a copy of the Opinion is annexed hereto and marked as Appendix A.

B.

Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C.

Questions Presented

The questions raised by petitioner are:

I. Whether purposeful delay of five years in securing an indictment with no notice to prospective defendants constitutes a deprivation of due process of law and a speedy trial?

II. Whether the trial court abused its discretion and violated petitioner's Fifth and Sixth Amendment rights by refusing to order psychiatric examination of, or permit negative character testimony with respect to, the Government's witness Itkin, an admitted liar, thief, cheat and perjurer?

III. Whether Section 1954 of Title 18 U. S. Code as retroactively applied herein to a "conspiracy" born prior to the effective date of the statute constitutes an "Ex Post Facto" law in violation of Article I, Section 9, Clause 3 of the United States Constitution?

D.

Constitutional Provisions and Statutes

Title 18, United States Code, Sections 371, 1954.

Article I, Section 9, Clause 3, United States Constitution.

Fifth and Sixth Amendments to the United States Constitution.

Title 28, United States Code, Section 1254(1).

Rule 19, Supreme Court Rules.

E.

Statement of the Case

Petitioner stands convicted of the crime of conspiracy to violate Section 1954 of Title 18, U.S. Code. He has been sentenced to two years in jail and a fine of $5,000.

This is another "ITKIN" case, the Government depending entirely upon the testimony of Herbert Itkin, a Government informer. This indictment is one of several returned within the past two years predicated for all practical purposes upon his uncorroborated testimony. Following the pattern of the other indictments, Itkin was named as a co-conspirator, but not as a co-defendant.

Involved in the alleged conspiracy was an attempt to obtain a mortgage for one Sam Giamonco to cover a hospital being constructed in Fairlawn, New Jersey. Giamonco was also named as a co-conspirator but he could not be named as a co-defendant, the Government having waited fourteen months after his death before seeking the indictment although they knew the facts in 1963, and possibly in 1962. The defendants sought to dismiss the indictment for lack of speedy prosecution since despite the admissions of Itkin that he was reporting to the F.B.I. since 1963 at least (and evidence indicated prior occasions to this) and to the C.I.A. previously, no indictment was returned until the very eve of the expiration of the Statute of Limitations, May 27, 1968.

The testimony if believable (virtually all of which stemmed from Itkin's lips) indicated that he and the defendants sought to obtain a mortgage from the Central States Southeast and Southwest Area Pension Fund (Teamsters) for Giamonco to construct a hospital in Fairlawn. To accomplish this, Itkin said that certain cash was paid to Wenger, an independent auditor (CPA) who was not employed by the Fund at all. This payment is supposedly the "kickback" alleged in the indictment.

The object of the agreement, labelled as a "conspiracy" by the Government, was successfully completed by February, 1962, when a formal mortgage commitment was issued by the Pension Fund. This was not only prior to the effective date of the statute, but also prior to its enactment by Congress.

In its charge the Trial Court told the jury that the alleged "conspiracy" began in December, 1961 (465; 511).* This

* Numerals in parentheses refer to pages of the Appendix below for this petitioner and co-defendant Wenger.

was a most serious error since the offense charged did not become a "crime" or violation of any Federal statute until the effective date of §1954 of Title 18 U.S.C. (June 19, 1962). The word "conspiracy" as understood in the law (§371, Title 18 U.S.C.) and by the lay public is a "criminal violation" (467-468). Certainly no one can argue that the acts charged could be the basis of any conspiracy until they were denominated a crime by Congress.

While the petit jury was deliberating, the Trial Court compounded its error in its response to a question submitted by the jury. Vigorous objections and requests for further charges were summarily denied (510-518).

The Court below conceded that the Trial Court improperly used the word "conspiracy". Even though the term was again improperly used by the Trial Court just before verdict, the Court of Appeals chose to believe that in spite of the impropriety the Trial Court had ". . . crystallized the jury's fact-finding responsibility in relation to the ex post facto problem" (Opinion below, Note 3, p. 2365, 7a).

The instant trial differs from any of the other trials in which Itkin testified in that it was developed without contradiction that Itkin had stolen from, cheated and defrauded members of his family (both blood and by marital relationship), clients, infant wards, close friends and for all practical purposes anyone he came into contact with, including the Federal Government.

Even the Trial Court below, having been exposed in a prior trial to the Government's witness in chief, Itkin, recognized the type of person he was (495). As has been his wont in the past, Itkin admitted to having committed innumerable frauds and to having told innumerable lies.

He had a ready answer and explanation, however incredible, for anything that might cast him in his true role.

In a desperate effort to justify his indictment by a New York County Grand Jury for conspiracy to suborn prejury Mr. Itkin claimed that the indictment was a "friendly one" used by the District Attorney of New York County in cooperation with the U. S. Attorney for the Southern District of New York in order to provide a "cover" for Itkin. Assistant District Attorney Frank Rogers branded this as a "lie" (378-381).

Without urging or connivance with the Assistant United States Attorney trying the case, Itkin managed to get before the jury that he claimed to have been a C.I.A. agent. The Trial Court would not permit Mario Brod his alleged "control" in the C.I.A. to take the stand as a witness for the defendant, although the Trial Court knew by reason of "robing room interrogation" that Brod would testify that Itkin's reputation for honesty and veracity among the people known to both of them (lawyers, accountants, clients and business people) was very bad and that he, Brod, would not believe Itkin under oath. In fact the Trial Court, at the instance of the Government, quashed the defense subpoena served upon Brod so that he never appeared upon the witness stand in open court before the jury.

Based upon Itkin's testimony in this and other cases, his history of having consulted a Doctor Crowley, a psychiatrist, on eighteen occasions within a six to eight week period, the defense vainly sought to have the Trial Court appoint a psychologist and a psychiatrist to examine Mr. Itkin and report to the Court and possibly testify for the defense.

In discussing Appellants' arguments below that Itkin is a "pathological liar" and a "a liar, thief, cheat and perjurer" and the request for psychiatric examination and negative character testimony, the Court of Appeals was forced to concede that "Itkin may well have possessed all of these characteristics . . .", and that the Government probably was following the precept "Set a thief to catch a thief", but found that the jury had had sufficient opportunity to appraise the credibility of the witness (Opinion below, p. 2366, 8a).

ARGUMENT

I.

Five years purposeful delay in securing the indictment herein constituted a deprivation of due process and denial of petitioner's constitutional right to a speedy trial.

The Court below has found that the U. S. Government in this case probably followed the precept "Set a thief to catch a thief" and that Herbert Itkin, the cornerstone of this prosecution "may well have possessed all of these characteristics"—"pathological liar", "liar, thief, cheat and perjurer" (Opinion below, p. 2366, 8a).

Nonetheless, the Court below dismissed the question of untimeliness of the indictment by holding that the Statute of Limitations is the primary guarantee against the bringing of stale criminal charges absent a showing of prejudice and that no prejudice had been developed in the instant case. As an additional makeweight the Court found "waiver".

It is our respectful submission that purposeful delay of the magnitude found in this case, with no notice or warning to a prospective defendant that his actions had come under scrutiny, is prejudicial per se in that it amounts to a denial of due process as guaranteed by the Fifth Amendment and that further, the record in this case amply discloses prejudicial circumstances. Where the Appellate Court finds a *probability* that the key, critical and virtually only Government witness is a *pathological liar,* fundamental fairness requires a minute scrutiny of the record and a reversal of conviction at the merest hint of prejudice through delay.

In its opinion the Court below cited the following cases to the proposition, "the statute of limitations is the primary guarantee against the bringing of stale criminal charges": *United States* v. *Ewell,* 383 U.S. 116, 122 (1966); *United States* v. *Feinberg,* 383 F.2d 60, 64 (2d Cir. 1967); cert. denied 389 U.S. 1044 (1968); *United States* v. *Capaldo,* 402 F. 2d 821, 823 (2d Cir. 1968). We call to the attention of the Court the fact that the unifying and deciding factor in each of the above cases was early notice—virtually contemporaneous with the events giving rise to prosecution, and that in the absence of such factor purposeful delay impinges heavily upon due process of law and the standard of fundamental fairness, in addition to the Sixth Amendment guarantee of a speedy trial.

In *Nickens* v. *United States,* 323 F. 2d 808 (D.C. Cir., 1963) the Circuit Court held that delay between the offense and the commencement of criminal prosecution is not covered by the Sixth Amendment, but Circuit Judge Burger took pains to point out that a due process question may be involved:

> "This is not to suggest that delay between offense and prosecution could not be so oppressive as to constitute a denial of due process" . . .
> "Although it has not been directly decided, due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused, . . ." (323 F. 2d 808, 810 n. 2).

Later, in *Ross* v. *United States,* 349 F. 2d 210, (D.C. Cir., 1965) the same court in the exercise of its supervisory responsibility for criminal proceedings reversed a conviction on the Fifth Amendment grounds presaged in *Nickens,* discussing the reach of the Fifth Amendment in the following terms:

> "But the Constitution contemplates a separate interest in fair procedures for the citizen faced with the loss of his liberty by reason of criminal charges. When interests of this nature impinge upon each other, as they have a way of doing, they must be accommodated. A balance must be struck, if one or the other is not to be sacrificed completely." (349 F. 2d 210, 213)

The Court below misconceived the relative weight to be accorded to the differing interests in the instant case and, based upon its misconception, erred. The factors which we claim required reversal herein are as follows:

(a) Itkin is conceded by the Court below to may well be a *pathological liar,* a thief and a cheat;

(b) Itkin himself, under oath in this case, twisted and turned but was forced to admit his own moral bankruptcy, defalcations, violations of trust as an attorney and other lies while testifying under oath;

(c) Itkin's testimony herein demonstrated the fact that his alleged memory was grossly faulty;

(d) Itkin previously testified before a federal Court in 1965 that he alone was responsible for the Fair Lawn mortgage, (see note 5, Opinion below, p. 2367, 9a);

(e) Itkin's present testimony implicating others came only after the death of Sam Giamonco, the principal in the Fair Lawn deal;

(f) Although Itkin "surfaced" in December, 1967, (see New York Times, December 15, 1969, p. 56, Col. 8) the Government did not seek the instant indictment until six month's later (May, 1968) and has never explained that delay;

(g) There was no "early warning" whatsoever to petitioner that his activities, legal when commenced in 1961, might be criminal by reason of a statute enacted in 1962 and effective June 19, 1962.

(h) While the Court below has found that the chief significance of Giamonco's death in 1967 "was that there were probably four defendants in the case rather than five" (Opinion below, p. 2367, n. 5, 9a) this ignores the testimony of financier William T. Blumberg (412-424) that the temporary financing for Fair Lawn was provided solely on the basis of Giamonco's credit and reputation and the value of the property (415-416) and not at all on the basis of any promised Welfare Fund "takeout" as testified by Itkin (416). (For Itkin's testimony that Blumberg advanced temporary financing only after Itkin assured him as to permanent financing, "hey, I got it locked" see Appendix below, p. 125).

It is worthy of note that the Court below excused the delay in bringing this prosecution on the grounds that the Government was entitled to protect the "cover" of Itkin. However, nowhere does the Court below address itself to the delay of approximately six months from the time Itkin allegedly came out of cover in December of 1967 and the return of the indictment on May 27, 1968. When all of the above factors are taken into consideration and given weight in the light of the probability that Herbert Itkin is a *pathological liar* then the principle of fundamental fairness demands to be brought into play for the protection of the alleged malefactors.

We argue most earnestly that the Court of Appeals for the Second Circuit has failed to properly exercise its supervisory power over criminal proceedings within its jurisdiction and has failed to see to it that due process is accorded this petitioner, and that plain error has been committed. Certainly, at this particular juncture in our history when the maxim "Justice delayed is justice denied" has come so much to the fore, this Honorable Court should carefully review the record in this matter and establish guide lines with respect to permissible pre-prosecution delay as it impinges upon due process of law and the standard of fundamental fairness.

We urge that the pre-prosecution delay herein violated not only petitioner's Fifth Amendment rights, but his Sixth Amendment right to a speedy trial as well. In spite of the federal case law apparently to the contrary, we submit that petitioner became an "accused" in 1963 when Federal authorities allegedly had a complete case against him, and that he certainly became an "accused" no later than December, 1967, when Herbert Itkin "surfaced". There has

been no explanation whatsoever by the Government for the six months delay in indictment after Itkin "came in from the cold".

We respectfully direct this Honorable Court's attention to the recent decision of the California Supreme Court (In Bank) in *Jones* v. *Superior Court of Los Angeles County*, 3 Cal. 3d 734, 91 Cal. Reptr. 578, (December 28, 1970). The case involved a nineteen month delay between complaint and arrest in a typical undercover narcotics officer case. The appellant there raised Constitutional issues under both the Fifth and Sixth Amendments, but the learned Court selected the Sixth Amendment right to a speedy trial as the basis for its decision commanding the lower Court to dismiss the prosecution.

In the majority opinion several reasons are advanced by Chief Justice Wright that we believe have substantial merit: That a man might well be said to become an "accused" this bringing the Sixth Amendment into play when law enforcement authorities either decide to charge him with an offense or have a reasonable basis for doing so. That the Statute of Limitations is not the sole guarantee against the bringing of stale criminal charges, for:

> "It imposes an outside limit on the initiation of a prosecution regardless of how justified the delay may have been. It does not, however, preclude judicial inquiry into the constitutionality of delays which occur within that period. If such inquiry were foreclosed, it would mean that the Legislature has determined the minimum standards required by the right to a speedy trial, and that this determination is binding on the courts. The judiciary, however, is the final arbiter of the meaning of the constitutional guarantee." (91 Cal. Reptr. 578, 581)

On the question of the interplay between the Fifth and Sixth Amendments in this area of the law, Mr. Chief Justice Wright stated:

> "Since we have concluded that petitioner was denied his right to a speedy trial, we do not reach his additional contention that the pre-arrest delay constituted a denial of due process. It should be pointed out, however, that a claimed denial of due process would be decided by the same approach, namely, balancing the effect of the delay on the defendant against any justification for the delay. Thus the impact of this decision cannot be avoided merely by delaying the filing of formal charges so that a particular defendant does not become an 'accused' within the meaning of the constitutional guarantee of the right to a speedy trial." (91 Cal. Reptr. 578, 583)

II.

The Trial Court abused its discretion and violated petitioner's Fifth and Sixth amendment rights by refusing to order psychiatric examination of, or permit negative character testimony with respect to, the Government's witness, Itkin, an admitted liar, thief, cheat and perjurer.

The Court below has found that the jury was made "fully aware of various negative aspects of Itkin's character" (Opinion below, p. 2368, 10a). This in spite of the fact that the Trial Court excluded the proposed negative character testimony of Mario Brod, Itkin's contact with the Central Intelligence Agency. Mr. Brod, who responded to a proper defense subpoena, was interrogated in the robing room and there stated that he would testify that Itkin's reputation among lawyers, accountants and businessmen for truth and veracity was a bad one and that he, Brod, Itkin's CIA

contact, would not believe Herbert Itkin's testimony under oath. The Court below conceded that the quashing of the defense subpoena for Mario Brod was error but held that it "does not necessarily constitute reversible error" (Opinion below, p. 2368, 10a). The Court below further held that it was not reversible error for the Trial Court to refuse to order Itkin to undergo psychiatric examination.

We submit that the Court below should not have treated these two matters separately and that they are not truly separable.

We most respectfully and earnestly argue that where an Appellate Court must needs find that a chief Government witness is probably a *pathological liar* or "may well have the characteristics" of a *pathological liar* then, as a matter of law and in fundamental fairness it was an abuse of discretion to deny psychiatric examination of the witness and to prevent the jury from hearing negative character testimony by the witness' superior at a key governmental agency behind whose cloak and under the aegis of which the witness has hidden. Quashing a proper subpoena and preventing the defendants from eliciting the testimony of Mario Brod constituted a deprivation of their Sixth Amendment right to compulsory process for obtaining witnesses in their favor and the right of confrontation. There is no indication in the record, indeed the indications are to the contrary, that Mario Brod would have refused to testify if actually called before the jury.

III.

Section 1954 of Title 18, U.S. Code as retroactively applied herein to a "conspiracy" born prior to the effective date of the statute constitutes an "ex post facto" law in violation of Article I, Section 9, Clause 3 of the United States Constitution.

In the Court below petitioner raised two issues relative to the *ex post facto* question as related to this prosecution of a "conspiracy" allegedly begun in 1961 to violate a statute that did not become law until June 19, 1962.

First, petitioner alleged error in that:

(a) The Trial Court erred in admitting into evidence with unlimited effect proof of acts committed prior to the effective date of the statute; and

(b) That this error was compounded by the Trial Court's consistent use of the word "conspiracy" to refer to pre-June 19, 1962 acts and agreements and the Trial Court's charge to the jury that the "conspiracy" could be found to have been formed and commenced "back in December, 1961", the latter error having been repeated just before verdict in response to questions by the jury.

Second, petitioner alleged error in that this entire prosecution was an attempt to apply Section 1954 of Title 18, U.S. Code retroactively, thus an unconstitutional *ex post facto* application thereof.

The latter of these two *ex post facto* arguments, the strict *ex post facto* application issue, the Court of Appeals specifically declined to resolve "because the proof clearly established that the conspiracy, and overt acts therein, con-

tinued long after June 19, 1962" (Opinion below, p. 2364, 6a).

The former issue, relating to the use of the word "conspiracy" by the Trial Court, the Court of Appeals resolved by a finding that although the Trial Court misused the term "conspiracy" it had nonetheless "crystallized the jury's fact-finding responsibility in relation to the *ex post facto* problem" (Opinion below, p. 2365 n. 3, 7a).

At the opening of the trial, the Government consented to the striking from the indictment of the first four overt acts alleged therein. The first three overt acts refer to the dates November 15, 1961 and December 14 and 15, 1961, which dates preceded the allegation in the indictment that "the conspiracy commenced on or about March 21, 1962". Despite the striking of these overt acts from the indictment, the Trial Court permitted proof concerning same during the trial without limiting the effect thereof. The Trial Court then erred in its charge to the jury that the conspiracy could be found to have been formed and commenced "back in December, 1961", and compounded this error by its response to a question from the jury foreman during deliberations and shortly before verdict. (510-512).

There can be no question but that trial counsel objected at each turn to the introduction of the pre-June 19, 1962 evidence, was given a continuing objection thereto, excepted to the charge of the Trial Court, and excepted to the additional charge by the Trial Court during the jury's deliberation (512-515).

We most respectfully submit that the cases of *Christianson* v. *United States*, 226 F. 2d 646, 652-53 (8th Cir. 1955), cert. denied 350 U.S. 994 (1956) and *Butler* v. *United States*,

138 F. 2d 977, 979-81 (7th Cir. 1943) cited by the Court of Appeals at page 2365 of its opinion herein clearly indicate that in this case pre-June 1962 evidence if admitted at all should have been severely limited in scope and effect both at the time of its admission and in the Trial Court's charge to the jury. As the 8th Circuit Court said in *Christianson*:

> "This evidence was preliminary in the sense that it could not in itself and by itself establish an unlawful conspiracy for the very obvious reason that the law making the conspiracy and its object unlawful had not yet gone into effect. The trial court so instructed the jury.... It was also made clear that the evidence of acts and admissions of alleged conspirators occurring prior to January 2, 1951, was, at the time it was offered, to be received as evidence of only that conspirator's intent." (*Supra*, p. 652)

It is our position that it is basically self-contradictory, illogical and factually inaccurate for the Court below to have found on the one hand that the Trial Court was understandably confused enough to improperly use the term "conspiracy" to describe pre-June, 1962 acts, but on the other hand and in the same breath to find that the jury's fact-finding responsibility in relation to the *ex post facto* problem had been crystallized by the same confused trial court.

The verdict of the jury was a "general verdict" and thus precludes any determination as to whether or not in its verdict of guilty of the Petitioner Russo under the only count in which he was named, Count I of the indictment herein, the jury followed the erroneous charge of the Court and consider the acts of December 1961 as unlawful.

See:

Jackson v. *Denno*, 378 U.S. 368 (1964); and *Chapman* v. *California*, 386 U.S. 18, 23 (1967).

Since the Pension Fund had issued its commitment for the mortgage loan sought on January 29, 1962, and it had been countersigned by the borrower in February 1962, that which it is alleged the Petitioner and his co-defendants sought to accomplish had thus, in fact, been accomplished. The mere payment of money after the Trustees of the Pension Fund had been "influenced" in making a favorable decision on the mortgage application was not a violation of the statute in question since under the theory of the Government it would have been a payment for services rendered at a time when such services were in fact not in violation of any Federal statute.

At the time the Constitution was adopted, many persons understood the term *ex post facto* laws to "embrace all retrospective laws, or laws governing or controlling past transactions . . . whether of a civil or a criminal nature". 2 Story, "Commentaries on the Constitution", § 1345. But in *Calder* v. *Bull*, 3 Dall. 386, 393 (1798), the Supreme Court decided that the phrase, as used in the Constitution referred only to penal or criminal statutes.

See, too,

Ex parte Garland, 4 Wall. 333, 377 (1867); and *Burgess* v. *Salmon*, 97 U.S. 381, 384 (1878).

Garland, Burgess and *Calder* indicate that the prohibition against *ex post facto laws* may not be circumvented by cute or subtle ruses, and the Courts will not tolerate putting a "civil" label on something really criminal to evade the ban.

These cases also stand for the proposition that every law which makes criminal an act which was innocent when done, or which imposes a greater punishment than allowed by existing law, is a prohibited "*ex post facto*" law and thus unconstitutional.

There is not a great deal of law on this subject since happily there have been only rare instances where *ex post facto* applications of law have occurred.

But in the case at bar, there can be no doubt that anything done prior to June 19, 1962 was innocent. It could not have been deemed a "conspiracy", and we hold the Court below to the *strictissimi juris* definition of that word because it defined the term to the jury as a "crime." The Court said, *inter alia* over exceptions (511):

> "To begin with, as you know, the government's case is such that they argue they have proved that the *conspiracy* began sometime late in *1961* and continued on up until the fall of 1963."

If the jury believed that any activity prior to June 19, 1962 could be used to assess "intent" or *mens rea* or the like, there would have been great prejudice. We do not know if they did, but the charge certainly allowed that result (*Jackson* v. *Denno*, *supra*).

It is our most respectful submission that the theory of the Government in this prosecution adopted in whole by the Trial Court, and as to which the Court of Appeals specifically declined to rule, that there could have been a "conspiracy" under section 371, Title 18, U. S. Code prior to the effective date of Section 1954, Title 18, U. S. Code constitutes an impermissible *ex post facto* application of the latter statute.

CONCLUSION

For the reasons above set forth, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 348-49—September Term, 1970.

(Argued December 17, 1970 Decided April 8, 1971.)

Docket Nos. 35255, 35389

UNITED STATES OF AMERICA,

Appellee,

—against—

LEONARD RUSSO and DAVID WENGER,

Defendants-Appellants.

Before:

MOORE, KAUFMAN and HAYS,

Circuit Judges.

Appeal from judgments of conviction entered June 5, 1970 in the United States District Court for the Southern District of New York after a trial before Harold R. Tyler, *Judge,* and a jury. Defendants were convicted under Count One for violation of 18 U.S.C. §§371, 1954 in that defendant Russo conspired to pay illegal kickbacks to defendant Wenger. Defendant Wenger was also convicted under Count Two for receiving $5,000 with intent to be influenced in respect to his official duties concerning a union pension fund in violation of 18 U.S.C. §1954.

Affirmed.

Appendix A—
Opinion of the United States Court of Appeals

GILBERT S. ROSENTHAL, New York, N. Y., *for defendant-appellant Leonard Russo.*

IRVING ANOLIK, New York, N. Y., for *defendant-appellant David Wenger.*

THOMAS J. FITZPATRICK, Assistant United States Attorney, New York, N. Y. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, N. Y., and Maurice McDermott, Assistant United States Attorney, on the brief), *for appellee.*

MOORE, *Circuit Judge*:

Defendants Leonard Russo (Russo) and David Wenger (Wenger) were convicted for violating 18 U.S.C. §§ 371 and 1954 in that Russo conspired with various persons to pay illegal kickbacks to Wenger, an agent and counsel of the Central States Southeast and Southwest Area Pension Fund of the International Brotherhood of Teamsters (the Fund),[1] which violation was charged in Count One of the

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[1] 18 U.S.C. § 371 provides in part:

"If two or more persons conspire . . . to commit any offense against the United States . . . and one or more such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1954 provides in part:

"(a) Whoever being—

* * * * *

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

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indictment in this case. Wenger was also convicted on a second count, for receiving $5,000 with intent to be influenced in respect to his official duties with respect to the Fund, also in violation of 18 U.S.C. § 1954. Wenger was sentenced on June 5, 1970 to two years, three months in prison and a $5,000 fine on each count, to run concurrently. Russo was sentenced to two years in prison and a $5,000 fine.

Although the substantive statute which was violated (18 U.S.C. § 1954) took effect on June 19, 1962, the Government's presentation included facts which antedated the effective date of the statute. The events material to the conspiracy charges commenced in 1961.

In the late Spring of 1961, James Plumeri (Plumeri), a defendant named in the indictment but who before trial was severed from the cases below, asked Herbert Itkin (Itkin), a co-conspirator not named as a defendant and who was the Government's chief witness at trial, to supply him with the names of persons who would be willing to make payoffs in order to obtain mortgages from the Fund. Plumeri would then use his "contact" with the Fund to obtain such mortgages. Plumeri's "contact" was Wenger, who since 1955 had been the auditor and financial adviser to the Fund.

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receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: * * *"

Appendix A—
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Plumeri asked Jack McCarthy (McCarthy), a defendant (convicted but who did not appeal) to introduce Itkin to Wenger. McCarthy complied and asked Wenger to cooperate with the scheme. Wenger agreed and demanded a fee of 5% of any mortgage loan requested. Russo then asked Itkin to obtain a mortgage for Sam Giamonco (Giamonco), who was building a hospital in Fairlaw, New Jersey. Itkin stated that a 12% fee would be required, 10% in "green" (cash) and 2% by check. Giamonco agreed, but stated that he needed a temporary loan of $400,000 pending approval of the mortgage. During a meeting held in September, 1961, which included Giamonco, Russo, Itkin and John Greco, Giamonco's attorney, Itkin offered to arrange for this temporary loan for a fee of $15,000. Thereafter, at Russo's instance Giamonco made an initial payment of $7,500 and submitted certain papers concerning the project. Itkin testified that on the basis of Wenger's representations that the mortgage would be granted, he (Itkin) was able to obtain for Giamonco the temporary $400,000 loan from the General Commercial Acceptance Corporation.[2] After the closing of this loan, Giamonco paid Itkin an additional $7,500 of which Russo got $5,000.

In December, 1961, with the meeting of the Board of Trustees of the Fund approaching, Wenger demanded that he be paid $25,000 cash prior to the meeting. He made it clear that if the cash was not produced, the deal was off. Itkin and Russo received $35,000 from Giamonco and flew to Chicago where the Board was about to meet. They paid

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[2] Later, Giamonco arranged to replace this source of temporary financing with a loan from The Chase Manhattan Bank.

Wenger the $25,000 and kept $5,000 each. Immediately thereafter, the Trustees approved the loan, although no formal application had been submitted and although a moratorium on the granting of mortgages by the Fund was in effect.

The Fund was willing to commit itself only to the extent of a loan equal to two-thirds the value of the property. This was not enough to meet Giamonco's requirements. After an appraisal which put that value at $1 million, Itkin had Wenger write to the Fund in January, 1962, asking that a loan of $875,000 be approved based on Giamonco's personal guaranty of the full amount of the mortgage and an "investigation" conducted by Wenger of Giamonco's personal financial situation. Wenger then asked Itkin for an additional $20,000. Giamonco, in turn, was required to pay $30,000 of which Itkin, Russo and McCarthy each received $5,000 and Wenger $15,000 rather than the $20,000 he had demanded. The Fund then mailed a letter of commitment to Giamonco's attorney, Greco, on January 30, 1962. Giamonco was still not satisfied and requested that he be required to guaranty the loan only to the extent of $350,000, which request was approved. He also requested an accelerated payout date which was also approved. Whereupon Russo and Itkin collected another $10,000 from Giamonco which they split.

All the foregoing occurred prior to the effective date of the statute which appellants are accused of violating. However, thereafter Wenger had demanded 5% of the total original amount requested (5% of $900,000 or $45,000) and was still "owed" $5,000, which amount he repeatedly

asked to be paid to him. During 1962 and 1963, Wenger obtained for Giamonco periodic extensions of the loan payout date but he ultimately refused to cooperate further until the $5,000 was paid. Russo, Plumeri and McCarthy all were asked by Itkin to contribute part of the needed $5,000. Russo suggested instead that Itkin get an additional $15,000 from Giamonco and pay Wenger from the money so obtained. Other than that, all three refused to help Itkin raise the money. Finally, on June 20, 1963, Itkin paid Wenger from his own funds, although by that date Itkin was cooperating with the Government. The requested further extension of the loan payout date, which Wenger had refused to act upon pending receipt of the $5,000, was then granted by the Fund. Thereafter, Giamonco paid Itkin $15,000; Itkin in turn paid Plumeri and McCarthy $3,500 each and Russo $1,500. On January 10, 1964, the mortgage loan was made by the Fund to the Fairlawn Hospital.

Both appellants contend that prejudicial error was committed by the Trial Court's admission into evidence of acts prior to June 19, 1962. Their argument, in summary, is that there was no statute prohibiting kickbacks prior to that date—hence, no crime. Ergo, there could not have been a conspiracy to commit a crime until the crime was statutorily created, and all evidence before June 19, 1962, should have been excluded. They point to dates in late January and early February 1962 when they claim that the formal mortgage commitment was issued and argue that, the object of the conspiracy having been fulfilled, the conspiracy had ended. In fact, appellants assert that prior

to the statute a conspiracy could not even have existed and cite Article 1, Section 9, Clause 3 of the Constitution that no "ex post facto Law shall be passed." The *ex post facto* question need not be resolved in this case because the proof clearly established that the conspiracy, and overt acts therein, continued long after June 19, 1962.

Merely because appellants' actions prior to June 19, 1962 did not violate §1954 does not mean that acts committed after that date, done in violation thereof, are in any way excused or that the conspiracy had ended. Here, a number of overt acts occurred after the effective date of the statute. Wenger refused to transmit a request for a delay in the payout date of the loan until Itkin paid him the $5,000 he demanded. Russo was paid $1,500 from the final payoff by Giamonco following the approval of the loan in final form. In addition he had suggested that the final $5,000 demanded by Wenger be raised by asking for the final payment from Giamonco ahead of time. These acts demonstrate that the conspiracy continued after the statute became effective and constitute a sufficient basis for concluding that the appellants violated the statute after its effective date.

Evidence relating to the period antedating the effective date of the statute was admissible in that it showed the intent and purpose of the conspirators' later acts. *Christianson* v. *United States*, 226 F.2d 646, 652-53 (8th Cir. 1955), *cert. denied* 350 U.S. 994 (1956); *Butler* v. *United States*, 138 F.2d 977, 979-81 (7th Cir. 1943). The acts subsequent to June 19, 1962 were a definite part of the same conspiracy. Testimony of prior acts was necessary

to enable the jury fully to appreciate the relationship between the payments which were made after the effective date of the statute and Wenger's "services" to Giamonco in connection with the mortgage.[3]

Wenger asserts, supported by Russo, that he was an independent C.P.A. and was not employed by, nor was he an agent of, the Fund. However, Wenger's status was a jury question which was resolved against him. More than ample evidence supports his relationship to the Fund as "counsel, agent." In rendering advice to the Fund on a regular basis, including giving the Fund advice regarding the financial status of potential borrowers. Wenger established an agency relationship with the Fund and, therefore, became a member of the class to which the

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[3] The Court stated:

> "... the government's case is such that they argue that the conspiracy began sometime late in 1961 .... [I]f you find that within the period alleged in the indictment all elements of the crime of conspiracy have been demonstrated ... then the crime becomes complete."

The indictment specified March 21, 1962 as the date of the commencement of the conspiracy, which, of course also was before the effective date of the statute. Although the definition of conspiracy found in 18 U.S.C. §371 (see note 1, *supra*) shows that the term is not properly applied to conduct which is legal, it is understandable that the District Court at times referred to as a conspiracy the pre-June 19, 1962 manifestations of the course of conduct which after that date was a conspiracy. No error is involved here because the Court made it quite clear to the jury that no conviction could be obtained unless it found that the conspiracy did not end prior to June 19, 1962 and that at least one overt act was committed after that date. That portion of the charge crystallized the jury's fact-finding responsibility in relation to the *ex post facto* problem.

statute is addressed, whether or not he could also properly be described as a "counsel" to the Fund.[4]

Both appellants concentrate heavily upon the Government's chief ("star") witness, Itkin, as a "pathological liar" and "a liar, thief, cheat and perjurer." Reversible error is asserted because of the Trial Court's refusal to order a psychiatric examination. Itkin may well have possessed all of these characteristics and the Government may have been, and probably was, following the precept "Set a thief to catch a thief" but in cases involving crime, the Government's witnesses are rarely pillars of the Church. As long as the jury from its observation has the opportunity to appraise the credibility of the witness in the light of the facts impugning his veracity, this constitutes the constitutional safeguard of a defendant's rights.

Appellants claim that they suffered a denial of their Sixth Amendment rights in that the Government delayed obtaining an indictment against them until just prior to the running of the statute of limitations and that such delay prejudiced the presentation of their defense. However, absent a showing of prejudice, pre-indictment delay does not violate the Sixth Amendment since "the statute of limitations is the primary guarantee against the bringing of stale criminal charges." *United States* v. *Ewell,* 383 U.S. 116, 122 (1966); *United States* v. *Feinberg,* 383 F.2d 60, 64 (2d Cir. 1967); *cert. denied* 389 U.S. 1044 (1968); *United States* v. *Capaldo,* 402 F.2d 821, 823 (2d Cir. 1968). The Sixth Amendment claim must fail here be-

[4] Appellants suggest that the term "counsel" is a synonym for "attorney."

cause the Government has justified its delay and because the appellants did not raise timely objection thereto. Itkin, the Government's principal witness, was an informer in numerous other situations about which he was supplying to the Government quantities of information. To protect Itkin's cover, the Government was justified in delaying the indictment of these defendants as long as the statute of limitations allowed. The only fact which appellants advance to show prejudice is that Giamonco died in 1967. They argue that he might have supplied additional evidence helpful to them. Mere speculation to this effect is insufficient and appellants have supplied us with nothing more.[5] Furthermore, appellants failed to make timely objection to this delay. Unlike their co-defendant Plumeri, they did not raise the issue on a pre-trial motion and it was not raised until after the close of the Government's case. This failure constitutes a waiver by appellants of their Sixth Amendment objections. See *United States* v. *D'Ercole*, 361 F.2d 211 (2d Cir.), *cert. denied* 385 U.S. 995 (1966); *United States* v. *Smith*, 363 F.2d 417 (2d Cir. 1966), *cert. denied* 385 U.S. 1027 (1967); *United States* v. *Sanchez*, 361 F.2d 824 (2d Cir. 1966). Thus, the delay in securing the indictment was not violative of appellants' constitutional rights. Appellants argue that Wenger does not fall under this definition. That claim is manifestly incorrect.

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[5] Itkin originally had refused to implicate anyone in connection with the Fairlawn mortgage. That Giamonco's death occurred before Itkin's change of heart was hardly significant. The chief significance of that fact was that there were probably four defendants in the case rather than five.

Appendix A—
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Not surprisingly, the defense at trial used a variety of tactics to discredit Itkin's testimony. On cross-examination, Itkin admitted that he had lied to a grand jury, that he had cheated his clients including an infant and his mother-in-law and that he had been indicted by a grand jury. He claimed at trial that this indictment by the grand jury was a cover but this was directly contradicted by the testimony of an Assistant District Attorney for New York County. The jury was, therefore, fully aware of various negative aspects of Itkin's character. The defense sought to call Mario Brod, who was described as Itkin's contact with the Central Intelligence Agency. It was stated that Brod would testify that he would not believe Itkin under oath and that Itkin's reputation for truthfulness was bad. In a situation where the jury's judgment as to Itkin's credibility was of great importance, any testimony reflecting upon Itkin's veracity was relevant. However, exclusion of this testimony does not necessarily constitute reversible error. There was ample other testimony before the jury on the basis of which it could have concluded that Itkin was unworthy of belief. Exclusion of this additional testimony thus falls into the category of harmless error.

Appellants suggest that the Court erred in refusing the request of the defense[6] that Itkin be required to submit to a psychiatric examination. Ordering a witness to

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[6] The government suggests that appellants have no standing to challenge this ruling since they did not join in the application at trial. We find the record somewhat ambiguous as to whether McCarthy's attorney may not have implied that he was speaking on behalf of all defendants, and, therefore, chose to rule on the merits of this issue without deciding the question of standing.

undergo a psychological examination is a drastic measure. Although apparently Itkin did consult two psychiatrists, his relationship to them seems to have been related to his marital difficulties and treatment being afforded his wife. In any event, the determination of whether a witness should undergo a psychiatric examination is a matter "particularly within the discretion of the District Court." *United States* v. *Lee Wan Nam*, 274 F.2d 863, 865 (2d Cir.), *cert. denied* 363 U.S. 803 (1960). The District Court clearly did not abuse its discretion.

Wenger further claims that the Court should have instructed the jury on the issue of entrapment[7] since Itkin was, in effect, a government agent at the time he made the final $5,000 payment. This argument overlooks the fact that it is undisputed that the Government did not initiate this scheme. At its inception Itkin was not working with the Government, and the final $5,000 payment was made only after repeated requests by Wenger. Furthermore, Wenger refused to take action on the requested extension of the payout date of the loan until such sums were paid. Since the Government did not initiate either the scheme as a whole or the final payoff, there was no entrapment. *United States* v. *Weiser*, 428 F.2d 932 (2d Cir. 1969).

The judgment of conviction as to both appellants is affirmed.

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[7] In fact, the Court did charge that if the jury found Itkin, at the time he gave Wenger the final $5,000, was a Government agent and that he "pressed the cash on Wenger . . . merely to set him up for a federal criminal charge and that Wenger took the cash for reasons having nothing to do with the loan or the fund," the jury should acquit.

APPENDIX B

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of April one thousand nine hundred and seventy-one,
Present:

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK McCARTHY, et al.,

Defendants,

LEONARD RUSSO, DAVID WENGER,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Order of the United States Court of Appeals Denying Rehearing

35255, 35389

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK McCARTHY, ET. AL.,

Defendants,

LEONARD RUSSO, DAVID WENGER,

Defendants-Appellants,

(and another case.)

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant Leonard Russo,

Upon consideration thereof, it is

Ordered that the petition for rehearing is denied; the motion for a stay and to continue bail is granted upon the conditions of F.R.A.P. 41(b).

April 23, 1971

s/ IRVING R. KAUFMAN
Irving R. Kaufman

s/ PAUL R. HAYS
Paul R. Hays

APPENDIX D

Order of the United States Court of Appeals Denying Rehearing En Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK McCARTHY, ET. AL.,

Defendants,

LEONARD RUSSO, DAVID WENGER,

Defendants-Appellants,

(and another case.)

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Leonard Russo, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it is hereby is denied.

J. EDWARD LUMBARD
Chief Judge

May 3, 1971

APPENDIX E

Constitutional and Statutory Provisions

ARTICLE I, SECTION 9, CLAUSE 3:

Article 1, Section 9, Clause 3 of the Constitution of the United States provides:

> "No Bill of Attainder or ex post facto Law shall be passed."

AMENDMENT 5, UNITED STATES CONSTITUTION.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT 6, UNITED STATES CONSTITUTION.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, United States Code, Section 371

"§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor, June 25, 1948, c. 645, 62 Stat. 701."

Title 18, United States Code, Section 1954

"§ 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan

Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value

because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: *provided,* That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act, as amended, and (b) "employee organization" and "administrator" as defined respectively in sections 3(3) and 5(b) (1) and (2) of the Welfare and Pension Plans Disclosure Act, as amended.
As amended Pub.L. 91-452, Title II, § 225, Oct., 15, 1970, 84 Stat. 930."

Title 28, United States Code, Section 1254(1)

"§ 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:"

Appendix E—Constitutional and Statutory Provisions

RULE 19, SUPREME COURT RULES

"Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."